PP

v.

RAMLI SHAFIE

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL TRIAL NO: 45-42-2000]
26 JUNE 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Prima facie case - Prosecution relying on confession by accused that he kept drugs in his house - Police had prior knowledge of whereabouts of drugs - Whether information inadmissible - Whether prima facie case not proved - Dangerous Drugs Act 1952, ss. 39(B)(1)(a), 39(B)(2) - Evidence Act 1950, ss. 27, 155(c)*

EVIDENCE: *Witness - Impeachment - Requirement of former inconsistent statement - Whether must be made on previous occasion - Former inconsistent statement given in same proceeding - Whether could be a basis for impeachment - Failure to call material witnesses - Whether fatal - Evidence Act 1950, s. 155(c)*

The accused was charged with an offence under s. 39B(1)(a), Dangerous Drugs Act 1952 for trafficking in 905.5 grams of cannabis. In the court, evidence was led by the prosecution that the accused, after his arrest and in answer to questions posed by the arresting officer ('PW4'), had confessed to keeping dangerous drugs in his house ('s. 27 information'). Evidence, however, was also led through PW3, the wife of the accused, that the police had prior knowledge of the whereabouts of the drugs before they arrested the accused. That being the case, before the learned judge herein, questions arose as to the admissibility of the s. 27 information and, as that information formed the basis of the prosecution's case, whether a *prima facie* case had been made out against the accused. The facts further showed that some aspects of PW3's evidence were inconsistent with each other, for which an application was made by the prosecution to impeach her credit. In the circumstances, a further question arose as to whether the expression "former statements" in s. 155(c), Evidence Act 1950 ('the Act') would include statements given at an earlier stage of the same proceeding.

Held:

[1] By s. 155(c) of the Act, the credit of a witness may be impeached by proof of a former statement inconsistent with any part of his evidence. For a former statement to be inconsistent with any part of the evidence, it must be extraneous to the evidence now given in court. The former statement must have been made on a previous occasion, not one given at an earlier stage of the same proceeding. (p 855 b-e)

[1a] There is no evidence here of a former inconsistent statement made by PW3 within the meaning of s. 155(c). The application to impeach her credit, hence, cannot be sustained. (pp 855 h & 856 a)

[2] The first question asked by PW4, namely whether the accused "ada menyimpan apa-apa barang salah di rumah" is a pointed question. It carries with it an implication that PW4 knew that the accused had incriminating objects in his house. This implication, however, must be judged against certain other evidence of the prosecution. (p 859 a)

[2a] The facts showed that suggestion was made to PW4 in his cross-examination that he had obtained the address of the accused and the information pertaining to the drugs from one DSP Tan Soon Fuan ('DSP Tan'). That being so, and since PW4 had denied the suggestion, DSP Tan ought to be called as a witness to negate the suggestion. This is important in view of the implication arising from the first question asked by PW4. Likewise, since PW3 had testified that she had given prior information regarding the whereabouts of the drugs to Sjn Hasnan, the latter ought also to be called as a witness by the prosecution. (pp 859 b & 859 d-f)

[2b] The prosecution's failure to call DSP Tan and Sjn Hasnan as witnesses had resulted in the implication attached to the first question asked by PW4 to remain as such. The implication has the effect of showing that PW4 had prior knowledge of the s. 27 information supplied by the accused. Consequently, the information is inadmissible in evidence. (p 859 f-g)

[3] The evidence of PW3 that she had provided the information to Sjn Hasnan on the whereabouts of the drugs was corroborated by the pointed nature of the question that PW4 posed to the accused. To that extent, the evidence of PW3 is of sufficient weight to create a doubt in the prosecution case insofar as the evidence of the accused under s. 27 of the Act is concerned. (p 859 h)

[4] The prosecution case, resting as it were on the s. 27 information, must necessarily collapse. It follows that no *prima facie* case has been made out against the accused on the charge preferred. (p 860 b-c)

[Accused acquitted and discharged.]

Case(s) referred to:
Ammathayarammal v. Official Assignee AIR [1933] Mad 137 ***(refd)***
Asokan v. State of Kerala [1981] Ker LJ (SN) 34 Ker (DB) ***(refd)***
Baburan v. Emperor AIR [1939] All 754 ***(refd)***
Balasingham v. PP [1959] MLJ 193 ***(refd)***
Bhojraj v. Sitaram AIR [1936] PC 60 ***(refd)***
BN Chobe v. Sami Ahmad [1969] 1 Andh LT 32 ***(refd)***
Herendra Kumar v. Emperor AIR 1938] Cal 125 ***(refd)***
Jai Pal Singh v. State [1996] Cri LJ 4097 ***(refd)***
Kalachand Sircar v. Queen-Empress ILR 13 Cal 53 ***(refd)***
Khoo Chye Hin v. PP [1961] MLJ 105 ***(refd)***
Koli Nana Bhana v. State of Gujarat [1986] Cri LJ 571 ***(refd)***
Laxman Sahu v. State of Orissa [1990] Cr LJ 821 ***(refd)***
Muniandy & Ors v. PP [1966] 1 MLJ 257 ***(refd)***
PK Das v. State [1971] ILR 2 Cal 392 ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Chong Nyuk Min [1995] 3 MLJ 642 ***(refd)***
PP v. Hashim Hanafi (Cr Trial No: 45-26-2001) (unreported) ***(refd)***
R v. Lambert [1967] Crim LR 480 ***(refd)***
Ratten Singh v. PP [1971] 1 MLJ 162 ***(refd)***
Re Wee Swee Hon, deceased [1953] MLJ 123 ***(refd)***
Sahdeo Tanti v. Bipti Pasin AIR [1969] Pat 415 ***(refd)***
Sat Pal v. Delhi Administration AIR [1976] SC 294 ***(refd)***
Schmidt v. Schmidt [1969] QWN 3 ***(refd)***
State of Mysore v. Raju Shetty & Ors AIR [1961] Mys 74 ***(refd)***
Yuen Chun Yii v. PP [1997] 3 SLR 57 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(A)(1)(b)
Evidence Act 1950, ss. 27, 154, 155(c), 157

Other source(s) referred to:
Graham Roberts, *Evidence: Proof and Practice*, p 545
RA Brown, *Documentary Evidence in Australia*, 2nd edn, p 41

For the prosecution - Sharlyza Alis Sharkawi DPP
For the accused - Nik Hashim Nik Daud; M/s Nik Hashim & Assoc

Reported by WA Sharif

JUDGMENT

Augustine Paul J:

In this case the accused was charged with trafficking in dangerous drugs in the following terms:

> Bahawa kamu pada 30 Mac 2000, jam lebih kurang 2.30 petang di rumah No. 144-22Q Tingkat 15, Blok D, Jalan Tun Razak, dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 905.5 gram cannabis, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The accused claimed trial to the charge. The prosecution rested its case on the evidence of Nor Azlina binti Abdullah (PW1), a sergeant attached to the police exhibit stores; Chief Inspector Yip Ngan Chew (PW2), the investigating officer of this case; Zalana binti Baharom (PW3), the wife of the accused; and Inspector Som Chai a/l Din Lian (PW4), the arresting officer. In his evidence PW4 said that on 30 March 2000 at about 12 noon he led a team of police officers to the Shell Petrol Station, Jalan Pahang, Kuala Lumpur upon information received from a member of the public that a male Malay driving a Toyota motor car was carrying dangerous drugs in the car. At about 12.45pm a blue Toyota KE motor car bearing registration number BAC 9586 drove into the petrol station. There was a male Malay in the car. When he got down from the car he was arrested. He is the accused. PW4 searched the car and the body of the accused but did not recover anything. The accused was then taken to the police station. PW4 instructed his officers to take the accused to his office at the sixth floor of the police station. After giving this instruction he went to meet his senior officer, one DSP Tan Soon Fuan. PW4 came back to his office at about 1.25pm. He read the caution under s. 37(A)(1)(b) of the Dangerous Drugs Act 1952 to the accused and asked him two questions. PW4 made a record of the questions and answers (exh. P17). It reads as follows:

> Pada 30.3.2000 jam lebihkurang 1.30 petang saya bacakan amaran beramaran yang diperuntukkan di bawah Sek 37A(1)(b) 1952 (ADB) seperti berikut: 'Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu bahawa kamu tidaklah diwajibkan menyatakan sesuatu atau menjawab apa-apa soalan, tetapi apa-apa jua yang kamu nyatakan, samada sebagai menjawab sesuatu soalan atau tidak, boleh diberi sebagai keterangan.'
>
> S: Benarkah kamu faham amaran yang saya bacakan?
>
> J: Ya, Saya faham.
>
> S: Adakah kamu ada menyimpan apa-apa barang salah di rumah?
>
> J: Ada, saya menyimpan ganja di rumah.

S: Bolehkah kamu tunjukkan kepada saya?

J: Boleh.

T.T. Pegawai Perakam T.T. OKT
Insp Som Chai A/L Din Lian Ramli bin Shafie
KP 660712-08-5051.

The accused then led PW4 and a team of police officers to his house the address of which is No 144-22-Q, Tingkat 15, Blok D, Jalan Tun Razak. The accused took the police officers to the hall of the house. PW3 and her two children were in the house at that time. As PW4 said:

> Di dalam ruang tamu tersebut OKT telah bawa saya ke salah satu penjuru di ruang tamu tersebut dan OKT telah mengeluarkan satu bungkusan plastik jenama Sogo dari bawah meja dan menyerahkan kepada saya. Selepas diserahkan kepada saya di hadapan OKT dan saksi polis didapati di dalamnya ada satu keratan akhbar bahasa Inggeris dan setelah dibuka didapati satu plastik lutsinar yang di dalamnya mengandungi satu ketulan mampat daun-daun kering disyaki dadah ganja. Saya kemudian bungkus semula dan barang kes serta OKT dibawa balik ke IPK Kuala Lumpur.

In further describing the place from where the exhibits were recovered he said:

> Kedudukan barang kes di dalam rumah ialah di bawah meja yang bertutup dengan kain dan terdapat dua kerusi sofa yang menutup separuh meja itu. (Saksi dirujuk kepada ID5D) Inilah kain yang saya maksudkan. Barang kes itu tidak boleh dilihat secara mudah apabila masuk ke dalam rumah. Barang kes itu berada di dalam keadaan tersembunyi.

The exhibits recovered are a plastic packet (exh. P12); an english newspaper (exh. P13); another plastic packet (exh. P14); and the dried leaves from exh. P14 (exh. P15). On 31 March 2000 PW4 handed them to PW2. On the same day he went to the scene with PW2 and detective Lance Corporal Nordin bin Ismail, a police photographer. Four photographs were taken at the scene (exhs. ID5 A-D). Later Nordin bin Ismail took a photograph of the exhibits at the police station (exh. ID7). PW4 was cross-examined on his meeting with DSP Tan Soon Fuan. In answer to questions he said:

> Sebelum rakamkan ID17 saya jumpa pegawai atasan saya di tingkat yang sama. Pegawai itu juga dari Bahagian Risikan dan Interrogation. Saya berada dengan pegawai itu lebihkurang 10 minit. Saya jumpa dia atas urusan pejabat untuk memberi penjelasan atas tugas yang saya jalankan sebelum itu. Ini maksud kes lain. Saya tidak tulis ini dalam diari. Pegawai itu DSP Tan Soon Fuan. I deny that I got the address of the accused and information pertaining to the drugs from DSP Tan.

In further cross-examination PW4 said that he did not know where the accused stayed and that he had drugs there. PW4 also said that the Cheras Police Station has a narcotics division. He added:

> Di bahagian itu ada seorang sarjan bernama Hasnan. Sjn Hasnan tidak ada terlibat dalam kes ini. Saya tak setuju Sjn Hasnan ada terlibat. Saya tak setuju maklumat tentang kes ini diberi oleh Sjn Hasnan.

PW2 sent the exhibits to the chemist for analysis who confirmed that exh. P15 contained a total of 905.5 grammes of cannabis. On 21 February 2001 PW2 served a copy of the chemist report (exh. P9) on the accused. In his cross-examination PW2 tendered in evidence the cautioned statement made by the accused (exh. D26).

PW3 said in her examination-in-chief, elicited on 3 July 2001, that on 30 March 2000 she stayed in the house with the accused and their three children. On that day she was on sick leave. The accused went out at 11am. When she was cooking in the kitchen she saw the accused coming with some persons. When she signaled to her husband asking who they were he said:

> Ini tiada apa-apa hal.

She then left them to give some medicine to her child. She then added:

> Ketika mereka keluar dari rumah saya berada di verandah. Akhirnya saya dapat tahu mereka yang datang ialah polis. Semasa mereka keluar saya nampak polis membawa sebungkus plastik and went away. Saya tidak tahu apakah bungkusan itu. Bungkusan itu tidak kepunyaan saya.

When she was referred to exhs. P12 and P7 she said:

> (Saksi dirujuk kepada ID12) Bungkusan yang polis bawa adalah seperti ini. Saya tidak lihat apa yang ada dalam bungkusan itu. (Saksi dirujuk kepada ID7) Saya tidak pernah lihat benda ini. Beg plastik dan kandungannya tidak kepunyaan anak saya. Saya tidak nampak tempat dari mana beg plastik itu diambil.

In her cross-examination on exhs. P12 and P15 she said:

> (Saksi dirujuk kepada ID12) Saya biasa dengan beg seperti ini. Plastik beg macam ini ada banyak di rumah. Saya nampak beg ini semasa mereka keluar dan saya ada di verandah. Pada masa itu suami saya tidak digari. ID12 bukan saya punya. I do not know whether this bag belongs to my husband. Saya tidak tahu siapa punya. (Saksi dirujuk kepada ID15) Saya tengok barang ini baru-baru ini.

Later she said:

> ID12 dan kandungannya bukan kepunyaan saya. (Saksi dirujuk kepada ID5D) Kawasan bahagian bawah meja bulat adalah kawasan tersorok. Saya tidak nampak ID12 di bawah meja bulat ini. The first time I saw the bag adalah bila polis keluarkan beg ini.

When asked about the friends of the accused she said:

> Suami saya ada kawan bernama Zam dan seorang bernama Ass. Mereka biasa datang ke rumah. They came to the house last about 2 weeks before the tarikh kejadian. Normally when I come back home they will be leaving. So I do not know what they do. When they come they will possibly sit in the hall. They will come inside the house kerana ada kesan minum. Ini banyak kali. I do not know what they work as.

She added:

> Saya juga tidak beritahu tentang dua orang ini kepada polis.

On 6 June 2002 PW3 was recalled for further cross-examination by the defence. This is what she said:

> Suami saya ditangkap pada 30.3.2000. Sebelum OKT ditangkap saya ada berhubung dengan polis di Balai Polis, Cheras. Saya berhubung dengan polis pada 29.3.2000 jam pukul 8.00 malam. Saya menelefon dari rumah. Saya cakap dengan seorang sarjan bernama Hasnan. Dia dari Bahagian Narkotik. Saya bagi tahu Sjn Hasnan bahawa saya syaki ada dadah di dalam beg plastik Sogo di dalam rumah saya. Pada hari itu apabila saya balik ke rumah pada jam 6.00 petang tiba-tiba ada dua orang kawan suami saya yang bernama Zam dan Ass tiba. Mereka menunggu suami saya pulang dan duduk di ruang tamu. Saya melihat mereka membawa beg plastik itu. Mereka menunggu suami saya pulang. Tidak lama kemudian mereka balik kerana sudah lewat. Keadaan kedua orang itu sangat mencurigakan. Setelah mereka balik saya pun mengemas rumah lalu terjumpa bungkusan tersebut. Saya menghubungi suami saya memaklumkan perkara itu. Perbualan dengan suami saya putus. Lepas itu seperti yang diarahkan oleh suami saya saya menelefon Sjn Hasnan. Bungkusan itu ada di bawah meja. Sjn Hasnan kata dia akan datang dengan segera. Saya ada maklumkan alamat saya. Lepas itu suami saya pun balik. Anak saya demam. Kami pergi ke klinik di Wangsa Maju. Saya ada jumpa Zam dan Ass beberapa kali sebelum perkara ini. (P17 dirujuk kepada saksi) Inilah bungkusan itu. Dalam plastik itu ada barang. Zam dan Ass telah ditangkap oleh polis. Saya dengar macam itu.

In her re-examination she said:

> Saya berhubung dengan seorang nama Sjn Hasnan. Saya kenal dengan Sjn Hasnan.

The learned deputy public prosecutor then applied for an adjournment of the proceedings to another date as her last witness Nordin bin Ismail, the photographer, was not available. I explained to her that it is not necessary to call him as a witness. All the photographs had been properly identified by PW2, PW3 and PW4 as an accurate representation of what they depicted without any objection to their authenticity. As such they can be marked as exhibits. It has been held that although the usual method of proving the relevance of photographs will be by calling the photographer as a witness, this is not essential to their admissibility (see *Schmidt v. Schmidt* [1969] QWN 3; *R v. Lambert* [1967] Crim LR 480). In further elaboration I refer to a passage from *Evidence: Proof and Practice* by Graham Roberts at p. 545:

> A question that arises where photographs are to be tendered is whether it is necessary to call the photographer. Generally speaking, there is no need to call the photographer provided that a witness is available who can testify that what is shown on the photograph is a fair and accurate representation of the scene at the relevant time. Calling the photographer will generally only be necessary when no such witness is available or in special cases when technical details of the photographer's art are likely to be in question. In other words, what is required, in the usual case, of a witness through whom a photograph is to be tendered is first-hand knowledge of what is shown in the photograph rather than first-hand knowledge of the taking of the photograph (see JW McElhaney, *Trial Notebook* (2nd ed, Litigation Section of the American Bar Association, 1987) pp. 202-203).

Similarly *Documentary Evidence in Australia* by RA Brown 2nd Ed says at p. 41:

> There are generally two methods for proving that things, including photographs, are those taken at the scene, either (1) by tracing custody of the film from the moment of taking until production in court, or (2) by identification of the ultimate print, through oral or other evidence, with the scene recorded (see *Russell v. Russell* [1875] 4 QSCR 103 (in banco); *Schmidt v. Schmidt* [1969] QWN 3 at 5; *Barron v. Valdmanis*, unreported, NSW Sup Ct Meares J, 2 May 1978).

As the photographs tendered for identification had been properly identified I admitted them as exhibits and caused them to be marked as exhs. P5 A-D and P7 without the need for the photographer to formally tender them with the negatives. The prosecution then closed its case and was fixed for continued hearing on the following day.

On the following day the deputy public prosecutor applied for leave to recall PW3 for further re-examination in view of the contradictions in her evidence given on 3 July 2001 and 6 June 2002. I allowed the application. This is what PW3 said:

Pada 3.7.2001 saya ada beri keterangan di Mahkamah. Semalam pun saya ada beri keterangan.

Q: Pada 3.7.2001 kamu ada kata mengenali Zam dan Ass bahawa 'They came to the house last about 2 weeks before the tarikh kejadian.' Semalam kamu kata 'Pada 29.3.2000 jam 6.00 petang apabila saya balik rumah tiba-tiba ada dua orang kawan suami saya yang bernama Zam dan Ass tiba. Mereka menunggu suami saya pulang.' Boleh terangkan perbezaan.

A : Kerana pada masa itu saya tak ingat tapi memang mereka ada datang ke rumah.

Q : Puan telah dirujuk kepada P12 dan telah mengatakan bungkusan yang polis bawa adalah seperti ini. Saya tidak lihat apa yang ada dalam bungkusan itu. Apabila dirujuk kepada P7 kamu kata: 'Saya tidak pernah lihat benda ini.' Semalam kamu kata: 'Setelah mereka balik saya pun mengemas rumah lalu terjumpa bungkusan plastik tersebut.' Boleh terangkan.

A : Saya mengatakan saya tidak pernah nampak barang kes seperti dalam Mahkamah seperti dalam gambar yang ditunjukkan tetapi saya memang ada lihat beg plastik itu. Pada hari itu apa yang ada dalam beg plastik saya tak nampak. Tetapi saya syaki itu adalah dadah.

Q : Semalam kamu kata ada bagi tahu Sjn Hasnan bahawa ada dadah dalam beg itu. Kalau tidak lihat apa ada dalam beg bagaimana boleh bagi tahu Sjn Hasnan ada dadah dalam beg plastik itu?

A : Pertama dari perwatakan Zam dan Ass dan seperti seorang penagih dadah dan kedua saya pernah lihat dalam TV bagaimana dadah dibungkus. Ketiga dari segi beratnya bila saya angkat. Keempat, apabila saya telefon suami saya menerangkan barang tersebut dia kata itu mungkin disyaki dadah.

Q : Apabila rujuk kepada P12 pada tarikh 3.7.2001 kamu kata: Saya tengok barang-barang ini baru-baru ini. Semalam kamu kata: Saya melihat mereka membawa beg plastik itu. Bolehkah terangkan?

A : Maksud saya yang saya nampak ialah isi kandungan iaitu barang kes.

The learned deputy public prosecutor then submitted that PW3 had contradicted herself in her evidence and applied for leave to impeach her credit under s. 155(c) ("s. 155(c)") of the Evidence Act 1950 ("the Act") which reads as follows:

The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him:

(a) … … …

(b) … … …

(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

The application for leave requires a consideration of whether the credit of a witness can be impeached when the inconsistency arises from different versions in the evidence itself that has been given in court. In other words, does the expression "former statements" in s. 155(c) include a statement given in evidence at an earlier stage of the same proceeding? The answer to this question is significant in view of the fact that it is only with a former statement that the credit of a witness can be impeached. The language employed in s. 155(c) makes the meaning of a former statement clear. The words used are that the credit of a witness may be impeached by proof of a former statement inconsistent with any part of his evidence. For a former statement to be inconsistent with any part of the evidence it must be extraneous to the evidence now given in court. The former statement must therefore have been made on a previous occasion. This is explained in the two illustrations to s. 155 which refer to statements made on previous occasions. Further support for my view can be found in the meaning of a similar expression used in s. 157 of the Act. As Biswas J said in *Herendra Kumar v. Emperor* AIR [1938] Cal 125 at p. 128:

> The words 'former statement' in s. 157 mean a previous statement of the witness who is to be corroborated made on another occasion, ie, an occasion other than that at which the subsequent statement requiring corroboration is made.

Thus as Kang Hwee Gee J said in *PP v. Chong Nyuk Min* [1995] 3 MLJ 642 at p. 651:

> It was clear that these four points could not constitute any valid ground on which counsel could mount his impeachment proceedings on DPC Mak. They were statements made in the course of the trial. Any variations or inconsistency that may arise in his evidence whether against his own evidence or against the evidence of another witness would have to be assessed accordingly by the court. They were clearly outside the scope of s. 155(d) of the Evidence Act 1950 which is concerned only with inconsistencies of 'former statements'. Accordingly, I disallowed counsel's application.

It follows that the application made by the learned deputy public prosecutor cannot be sustained as there is no evidence of a former inconsistent statement made by PW3 within the meaning of s. 155(c). Perhaps the prosecution ought to have taken the necessary steps to have PW3 declared as a hostile witness

pursuant to s. 154 of the Act. There is nothing in the section to warrant an inference that only when any previous statement of the witness is available and if he is alleged to have departed from that the court can declare that witness hostile (see *Sahdeo Tanti v. Bipti Pasin* AIR [1969] Pat 415). Thus the section is not confined to contradictions in a former statement made by a witness; it also includes evidence given earlier (see *Re Wee Swee Hon, deceased* [1953] MLJ 123; *Yuen Chun Yii v. PP* [1997] 3 SLR 57). The permission to treat a witness as hostile can be made at any of the three stages of examination (see *BN Chobe v. Sami Ahmad* [1969] 1 Andh LT 32). An application for recalling a witness whose examination is over for the purpose of treating him as hostile and cross-examine him will not be allowed (see *Ammathayarammal v. Official Assignee* AIR [1933] Mad 137; *PK Das v. State* [1971] ILR 2 Cal 392). The inconsistencies in the evidence of PW3 are therefore matters that go only to her credibility as a witness.

The evidence that PW3 gave in court on 6 June 2002 will have a significant bearing on the outcome of the case. This is because the case for the prosecution is anchored on information supplied by the accused under s. 27 of the Act. The evidence of PW3 shows that the police had prior knowledge of the information. That will affect the admissibility of the information supplied by the accused and, thereby, the entire prosecution case. The learned deputy public prosecutor submitted at the close of the case for the prosecution that the evidence of PW3 must not be accepted; that it must be viewed with caution as she is the wife of the accused; and that even if her evidence is accepted it does not constitute prior knowledge as it was the accused who led the police to his house. It must be observed that PW3 was a witness who was called to testify by the prosecution. The prosecution made an unsuccessful attempt to impeach her credit. No attempt was made by the prosecution to have her declared as a hostile witness under s. 154 of the Act. These are the two courses open to the prosecution to deal with a witness who is not telling the truth or is suppressing some truth (see *Koli Nana Bhana v. State of Gujarat* [1986] Cri LJ 571). Ordinarily when a party puts a witness in the box he can be taken to represent to the Court that the witness is expected to state the truth. Be that as it may, there is no rule of law saying that a party is precluded from saying that a witness produced by him is not speaking the truth upon some particular point unless he has been declared hostile (see *Baburan v. Emperor* AIR [1939] All 754). It is not right to proceed on the basis that whatever is stated by a witness which is not in favour of the party calling him should necessarily be believed as if it were an admission made and binding upon the party calling him. In this regard I refer to *State of Mysore v. Raju Shetty and Ors* AIR [1961] Mys 74 where Narayana Pai and Ahmed Ali Khan JJ said at p. 78:

> It is true that ordinarily when a party puts a witness in the box, he can be taken to represent to the Court that the said witness is expected to state the truth. It is also true on the ground of policy that a party should not be permitted to treat a witness as hostile the moment he gives any answers adverse to his case. It is entirely for the Court to decide whether in given circumstances a witness has turned hostile and whether permission should be granted to the party calling him to cross-examine him.
>
> Hence, even if a party calling a witness wants to treat him as hostile, his opinion as to the hostility or otherwise of the witness or the truth or otherwise of his evidence, is not final and not binding on the court. The very object of taking evidence is to discover the truth as far as it is humanly possible for the presiding judicial officer to do. The fact, therefore, that sound public policy requires that a party should not be permitted to malign his own witness, cannot and does not absolve the court of its own high duty of attempting to discover the truth.
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> Even when a witness deposes in favour of the case of the party calling him, the court on a consideration of his evidence is entitled to either believe or disbelieve him. The rule does not change if the evidence given by such a witness is adverse to the case of the party calling him. Even in such a case, the court has the power and duty of deciding whether or not to believe him. It is, therefore, not right, in our opinion, to proceed on the basis that whatever is stated by a witness which is not in favour of the case of the party calling him should necessarily be believed as if it were an admission made and binding upon the party calling him.

The Privy Council has stated that the real tests for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case (see *Bhojraj v. Sitaram* AIR [1936] PC 60). It has been held that if a witness demonstrably tells lies, his evidence must be looked upon with suspicion and treated with caution, but to say that that it should be entirely rejected would be to go too far (see *Khoo Chye Hin v. PP* [1961] MLJ 105). The inherent probability or improbability of a fact in issue must be the prime consideration in assessing the credibility of a witness (see *Muniandy & Ors v. PP* [1966] 1 MLJ 257). In assessing the credibility of PW3 it must therefore be determined whether her evidence is consistent with itself and, more importantly, whether it fits in with the other evidence adduced by the prosecution.

I shall first consider whether the evidence of PW3 is consistent with itself. In her evidence on 3 July 2001 she said that she does not know whether exh. P12 belongs to her husband; that she did not see it under the table; that the first time she saw it was when the police took it out; that she had not seen

exh. P15 earlier; that she had not seen the item in exh. P7 previously; that the accused's friends, Zam and Ass, last came to her house about two weeks prior to the incident; and that she did not tell the police about these two persons. When she was recalled for further cross-examination on 6 June 2002 she said that Zam and Ass came to her house on 29 March 2000; that they brought a Sogo plastic bag into the house; that they looked suspicious; that she found the bag under the table when they left; that she informed the accused about it who told her to contact Sjn Hasnan; and that she duly informed Sjn Hasnan that she suspected that there were dangerous drugs in a Sogo plastic bag in her house and gave her address. When asked to explain her contradiction regarding the last time that Zam and Ass came to her house she said that she did not remember it when she first testified but is sure that they came as she now claimed; with regard to her earlier testimony she confirmed that she had not previously seen the item in exh. P7 but had seen the plastic bag before; that her earlier testimony on exh. P12 was confined to its contents; and she explained why she suspected that the plastic bag contained dangerous drugs. It will be observed that the re-examination of PW3 did not cover the full area of inconsistencies in her evidence. It cannot be assumed that what PW3 said in cross-examination is not the truth. It must still be assessed for whatever value it may have (see *Jai Pal Singh v. State* [1996] Cri LJ 4097). Where there are material inconsistencies in the evidence of a witness he can be believed if he is supported by other satisfactory evidence (see *Kalachand Sircar v. Queen-Empress* ILR 13 Cal 53). In such circumstance the court may, after considering the evidence of the witness as a whole, with due caution and care, accept, in the light of his testimony which it finds to be credit-worthy and act upon it (see *Sat Pal v. Delhi Administration* AIR [1976] SC 294). As PW3 has not been given an opportunity to fully explain herself a finding on her credibility is best done against the background of the other evidence in the case. The crux of the case for the prosecution is the information supplied by the accused as recorded in exh. P17. PW4 said in his evidence that the information supplied by the accused is in response to two questions that he had asked. As I said in *PP v. Hashim bin Hanafi* (Kuala Lumpur Cr Trial No 45-26-2001) at pp. 19-20:

> The information should not be given by any prompting with any pointed question (see *Sarkar on Evidence* 15th Ed Vol I p 527). The question put should not be phrased in such a way so as to juxtapose the words therein to give the impression that the accused gave information which not only led to the discovery of a fact but also contained an admission (see *PP v. Norzilan bin Yaacob & Anor* [1989] 1 MLJ 442). The question should also not carry with it any in-built incriminating evidence in contravention of the requirements of section 27.

The first question asked by PW4 was whether the accused "… ada menyimpan apa-apa barang salah di rumah?" This is a pointed question. It is specific in nature as it pin-points an identified place. It carries with it an implication that PW4 knew that the accused had incriminating objects in his house. This implication must be judged against certain other features of the prosecution case. It was suggested to PW4 in his cross-examination that he obtained the address of the accused and the information pertaining to the drugs from one DSP Tan Soon Fuan whom he had seen just prior to the interrogation of the accused. PW4 denied the suggestion. I am aware that a suggestion put to a prosecution witness is not evidence. But it is an indication of the case to be advanced by the defence. However, as I said in *PP v. Chia Leong Foo* [2000] 4 CLJ 649 at p. 675:

> … the prosecution is expected to negative in its case in chief the explanation that the defence could be expected to advance in answer to the allegations against it (see *Evidence: Proof and Practice* by Graham Roberts (1st edn) p. 376).

It is my view that the prosecution ought to have called DSP Tan Soon Fuan as a witness to negate the suggestion made. This is necessary at this stage of the prosecution case in view of the implication arising from the first question asked by PW4. If the doubt is not resolved the implication will remain as such and thereby affect the admissibility of the information. This is compounded by the fact that PW3, who, it must be noted, is a prosecution witness, said in her evidence that she had given prior information regarding the whereabouts of the drugs to Sjn Hasnan. Sjn Hasnan does in fact exist and is not a fictitious figure. If he had been called as a witness by the prosecution his evidence, if contrary to that of PW3, would have completely demolished her evidence. With that the significance of the evidence of DSP Tan Soon Fuan will also disappear. However, Sjn Hasnan was not called as a witness by the prosecution. The implication attached to the first question asked by PW4 therefore remains. The prosecution has failed to avail itself of available resources to dispel this notion. The implication has the effect of showing that PW4 had prior knowledge of the information supplied by the accused which, consequently, is not admissible. This prior knowledge could have come from the information that PW3 gave to Sjn Hasnan. It must be observed that even in the case of a witness who has been declared hostile so much of his evidence which is corroborated by other evidence can be accepted (see *Laxman Sahu v. State of Orissa* [1990] Cr LJ 821; *Asokan v. State of Kerala* [1981] Ker LJ (SN) 34 Ker (DB)). The evidence of PW3 is corroborated by the pointed nature of the question that PW4 posed to the accused. To that extent the evidence of PW3 is of sufficient weight to create a doubt in the prosecution case insofar as the

evidence of the accused under s. 27 of the Act is concerned. The fact that PW3 is the wife of the accused does not disentitle her to credence, contrary to the submission of the learned deputy public prosecutor, until cogent reasons for disbelief have been advanced (see *Balasingham v. PP* [1959] MLJ 193; *Ratten Singh v. PP* [1971] 1 MLJ 162). No such evidence was adduced by the prosecution. The further submission that the information supplied by PW3 does not, in any event, amount to prior knowledge as it was the accused who led the police to the house is without merit. Pointing out premises of which the address is known to the police cannot amount to first information as the police could find the location without assistance. My assessment of PW3's credibility would have been different if not of the inherent weakness in the prosecution case to which I have made reference. The case for the prosecution which had rested on this piece of evidence therefore collapses.

In the upshot I held that the prosecution has failed to make out a *prima facie* case against the accused and, accordingly, acquitted and discharged him.